HEIRS OF LINDA ANELON

IBLA 86-258 Decided March 23, 1988

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-53142.

Set aside and referred for hearing.

1. Alaska: Native Allotments -- Rules of Practice: Appeals: Generally

Where on appeal from a BLM decision rejecting a Native allotment application because the application was not pending before the Department on Dec. 18, 1971, the Board determines that there is a question of fact whether the application was pending on that date, the Board will set aside the BLM decision and refer the case for a hearing before an Administrative Law Judge.

APPEARANCES: Tred R. Eyerly, Esq., Anchorage, Alaska, for appellants; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The heirs of Linda Anelon have appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated December 10, 1985, rejecting Native allotment application AA-53142 because there was insufficient proof that the application had been filed with the Department prior to December 18, 1971.

The record indicates that the Alaska Legal Services Corporation (ALSC) filed Native allotment application AA-53142 on behalf of the heirs of Linda Anelon with the Bureau of Indian Affairs (BIA) on August 9, 1982, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed effective December 18, 1971 by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1982)). The application, which was signed by Henry Anelon, brother of Linda Anelon, alleged use and occupancy of approximately 160 acres of land situated in secs. 28 and 33, T. 5 S., R. 33 W., Seward Meridian, Alaska, along the Newhalen River near Iliamna Lake for fishing and berrypicking from October or November of "69-70."

In an August 5, 1982, letter which accompanied the application, ALSC stated that the application had been "completed by Henry Anelon to reflect, to the best of his ability, the contents of [Linda Anelon's] original application." The application was also accompanied by two affidavits which attested to the fact that the original application had been filed with BIA prior to December 18, 1971. In a June 18, 1982, affidavit, Henry Anelon stated that while attending school in Anchorage, Alaska, "from September 1969 to June 1970" he and Linda lived with Eleanor and Jake Himler and that he and Linda "went together to fill out our allotment applications." In an April 20, 1982, affidavit, Eleanor Himler confirmed that Henry and Linda had lived with her and her husband while attending school in Anchorage in the "early 1970's" and that Henry and Linda had filed Native allotment applications at that time:

> I know that Henry and Linda filed applications for Native allotments before it was too late to do so. My husband and I heard or read some kind of notice on Native allotments. * * * My husband and I realized that Henry and Linda were eligible to apply for land. We talked about making sure they applied for land before it was too late.
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> * * * I remember driving Henry and Linda to the BIA office on "C" Street here in Anchorage. This was in 1970 or 1971. I did not go into the building with Henry and Linda because my husband and I always felt they were mature enough to handle their own affairs.

In the August 1982 letter, ALSC stated that Henry Anelon's application was forwarded to BLM in 1981, after having been apparently "misplaced" and then found by BIA, but that Linda Anelon's original application had not yet been found.

On December 6, 1982, BIA certified, on the back of the August 1982 application, that Linda Anelon was a Native entitled to a Native allotment. 1/ BIA forwarded the application to BLM, with a December 15, 1982, cover letter which stated that BIA had "yet to find BIA's copy of her application." The application was received by BLM on December 17, 1982.

By memorandum dated January 3, 1983, a BLM land law examiner notified BIA that Linda Anelon's application could not be accepted "[w]ithout your copy or an affidavit from BIA that the applicant did in fact file prior to Dec. 18, 1971." There is no evidence that BIA responded to this January 1983 memorandum.

1/ The standard certification on the back of the Native allotment application form (Form 2212-13 (June 1966)) provided:

"I Certify Hereby That the above-named applicant is a native entitled to an allotment under the appropriate regulations in 43 CFR 2212. I further certify that the applicant has occupied, marked, and posted the lands as stated in this application and that this claim does not infringe on other Native claims or area of Native Community use."

On January 19, 1983, an attorney with ALSC formally requested an "administrative hearing" pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), in order to resolve the question of whether Linda Anelon's Native allotment application was filed prior to December 18, 1971. 2/ In its December 1985 decision, BLM rejected Linda Anelon's application, concluding that, while a reconstructed application was legally authorized where neither the original nor a copy was available, there was insufficient proof in this case that the original application was filed with the Department prior to December 18, 1971. BLM stated that such proof "must include a Federal agency document showing timely receipt" and that "allegations of timely filing without such proof are insufficient." 3/ The heirs of Linda Anelon have appealed that BLM decision.

In their statement of reasons for appeal, appellants contend that the evidence with respect to the filing of Linda Anelon's Native allotment application, including the two affidavits, is sufficient to raise a question of fact whether the application was filed with the Department prior to December 18, 1971, which question must be resolved in a hearing, as required by the court in Pence v. Kleppe. 4/ Appellants request the Board to vacate the December 1985 BLM decision and remand the case to BLM for initiation of a Government contest.

In response to appellants' statement of reasons, BLM contends that the evidence with respect to the filing of Linda Anelon's Native allotment application is not sufficient to raise a question of fact and, thus, no hearing is required by Pence v. Kleppe. BLM argues that proof of a timely filing must consist of either a time stamped document or an affidavit of a Departmental official attesting to receipt, in accordance with the "October 18, 197[3] instructions of Assistant Secretary Horton" (Answer at 5).

2/ Because the Native Allotment Act of May 17, 1906, was repealed on Dec. 18, 1971, by section 18(a) of ANCSA, 43 U.S.C. § 1617(a) (1982), which provides that "any application for an allotment that is pending before the Department of the Interior on December 18, 1971, may, at the option of the Native applicant, be approved and a patent issued in accordance with [the] * * * 1906 Act," the question is whether Linda Anelon's Native allotment application was pending before the Department of the Interior on Dec. 18, 1971.

3/ The December 1985 BLM decision was based on an Oct. 1, 1985, memorandum to the Alaska State Director, BLM, from the Deputy Regional Solicitor, which had set forth the standard of review and, based on that standard, concluded that the proof submitted in support of Linda Anelon's application, including the two affidavits, was insufficient.

4/ Along with their statement of reasons, appellants submit a copy of a Mar. 12, 1982, letter to BLM from BIA. The letter which accompanied the Native allotment application of Henry Anelon (AA-47358) filed with BLM on Mar. 19, 1982, stated: "This application was found in a drawer during one of my clean-up campaigns and I cannot vouch with certainty that it was before the Agency on December 18, 1971."

Before addressing the question of whether Linda Anelon's original Native allotment application was filed with the Department prior to December 18, 1971, we must consider whether the Department has jurisdiction over this case where, as BLM points out on appeal, the surface estate of the land involved herein was conveyed on January 30, 1980, subject to valid existing rights, to the Newhalen Native Corporation, a Native village corporation, under Interim Conveyance No. 283, pursuant to sections 14(a) and 22(j) of ANCSA, as amended, 43 U.S.C. §§ 1613(a) and 1621(j) (1982). It is clear that upon issuance of interim conveyances, which convey land out of Federal ownership, the Department loses jurisdiction to adjudicate Native allotment applications as interests in the land conveyed. City of Klawock, 94 IBLA 107, 111-12 (1986); Kenai Natives Association, Inc., 87 IBLA 58, 61 (1985). That is the situation here. 5/ However, the Department has a fiduciary duty to Alaskan Natives under the Act of May 17, 1906, to determine the validity of Native allotment applications and to pursue recovery of the land through negotiation or litigation in the case of valid applications. State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984); Elizabeth G. Cook, 90 IBLA 152, 156-57 (1985). In the present case, BLM has determined only that Linda Anelon's application was invalid because it was not filed prior to December 18, 1971. Accordingly, at this point we need only address the question of the timeliness of the filing of that application.

[1] In resolving questions of filing, the Board has relied on an October 18, 1973, memorandum to the Director, BLM, from Assistant Secretary Horton, referred to by BLM on appeal. See Ouzinkie Native Corp. v. Opheim, 83 IBLA 225, 228-29 (1984). That memorandum states that an application will be deemed to be "pending" where it "[has] been on file in any bureau, division, or agency of the Department of the Interior on or before December 18, 1971":

> Evidence of pendency before the Department of the Interior on or before December 18, 1971, shall be satisfied by any bureau, agency, or division time stamp, the affidavit of any bureau, division, or agency officer that he received said application on or before December 18, 1971, and may also include an affidavit executed by the area director of BIA stating that all applications transferred to BLM from BIA were filed with BIA on or before December 18, 1971.

In the present case, there is, of course, no "time stamp" on Linda Anelon's original application placed there by any bureau, agency, or division

5/ Conveyance of the land out of Federal ownership, on Jan. 30, 1980, also precluded the subsequent legislative approval of Linda Anelon's Native allotment application pursuant to section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a) (1982), assuming the application had been pending before the Department on or before Dec. 18, 1971, and satisfied the other statutory criteria. See Heirs of Doreen Itta, 97 IBLA 261, 265 (1987).

of the Department because the original application has not yet been found in any Departmental records. Moreover, the record contains no affidavit by any bureau, agency or division officer attesting to the timely filing of the original application. The only evidence in support of timely filing is the Himler and Henry Anelon affidavits attesting to the fact that Linda Anelon filed her original application prior to December 18, 1971. Those affidavits are not sufficient by themselves to establish that Linda Anelon's application was "pending" before the Department on December 18, 1971. See Nora L. Sanford (On Reconsideration), 63 IBLA 335 (1982). As we said in William Yurioff, 43 IBLA 14, 17 (1979): "[A] general statement that an appellant had an application on file with BIA is not sufficient to establish that the particular application under review had been timely filed."

However, we reject the conclusion, set forth in the December 1985 BLM decision, that sufficient proof that a Native allotment application was pending before the Department on December 18, 1971, "must include a Federal agency document showing timely receipt." That conclusion was apparently derived from Assistant Secretary Horton's October 18, 1973, memorandum. However, that memorandum stated that evidence of pendency "shall be satisfied" by a Departmental time stamp or the affidavit of a Departmental official attesting to receipt on or before December 18, 1971. We do not believe the memorandum precluded reliance on other evidence. Nevertheless, we wish to emphasize that affidavits attesting to a timely filing, standing alone, are not sufficient to establish such filing. There must be independent corroborating evidence that the Native allotment application was actually received by a Departmental office on or before December 18, 1971. See Wilson v. Hodel, 758 F.2d 1369, 1374 (10th Cir. 1985); John R. Wellborn, 87 IBLA 20 (1985); H. S. Rademacher, 58 IBLA 152, 156, 88 I.D. 873, 876 (1981). Such corroborating evidence is absent from the present record.

Nevertheless, Pence v. Kleppe, in conjunction with Pence v. Andrus, 586 F.2d 733, 743 (9th Cir. 1978), stands for the proposition that due process considerations in the case of an Alaskan Native require an oral hearing prior to Departmental rejection of a Native allotment application if there is a material issue of fact regarding the validity of the application. See also United States v. Consolidated Mines & Smelting Co., Ltd., 455 F.2d 432, 453 (9th Cir. 1971). In Pence, the factual question involved whether the applicant had complied with the use and occupancy requirements of section 3 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-3 (1970). However, the requirement of a hearing has also been applied by the Board to the question of whether an application was voluntarily and knowingly relinquished (Feodoria (Kallander) Pennington, 97 IBLA 350, 354-55 (1987) and whether a Native allotment application was pending before the Department on December 18, 1971 (Stephen Northway, 96 IBLA 301, 308 (1987)).

We conclude that the Himler and Henry Anelon affidavits are sufficient by themselves to raise a question of fact whether Linda Anelon's original Native allotment application was pending before the Department on December 18, 1971. This is because, accepting the truth of the affidavits, as we must do

in determining whether there is a question of fact (Donald Peters, 26 IBLA 235 241 n.1, 83 I.D. 308, 311 n.1 (1976)), the affidavits state affirmatively that the application had been filed with BIA prior to December 18, 1971. On the other hand, BLM's position is supported by the presumption, which stems from the absence of Linda Anelon's original application from the record, that the application was not filed timely. E.g., David A. Gitlitz, 95 IBLA 221, 224 (1987). In such a situation, there clearly is a factual question whether Linda Anelon's Native allotment application was pending before the Department on December 18, 1971. 6/

Accordingly, we will set aside the December 1985 BLM decision and refer the case to the Hearings Division, Office of Hearings and Appeals, for the assignment of an Administrative Law Judge, pursuant to 43 CFR 4.415. 7/ The Judge will hold a hearing on the question of whether Linda Anelon had a Native allotment application pending before the Department on December 18, 1971. 8/ Following the hearing, the Administrative Law Judge will issue a decision, which will be appealable to the Board pursuant to 43 CFR 4.410. In the absence of an appeal, the decision of the Administrative Law Judge will be final for the Department.

6/ In support of its contention on appeal that a hearing is not required under Pence on the question of whether Linda Anelon's original application was pending before the Department on December 18, 1971, BLM relies on the case of State of Alaska, 82 IBLA 165 (1984). In that case, while we concluded that there were disputed questions of fact, we, nevertheless, declined to grant a hearing because "most of the available evidence has already been incorporated in the record before us" and "a hearing would be unlikely to yield evidence which would contribute significantly to [that] record." Id. at 169. However, the factual question in that case did not concern whether the Native allotment applicant had properly filed or relinquished her application or had complied with the statutory requirements of use and occupancy, but whether the land claimed by her was vacant and unappropriated. As such, the case did not involve a question of the actions of the applicant for which applicants have been allowed to offer evidence in a hearing or a question which either the court in Pence or the Board has found to be subject to a hearing. On that basis, we distinguish State of Alaska.

7/ Although, in accordance with Pence v. Andrus, supra, we have held that when there is a material issue of fact BLM must issue a contest complaint (Mary DeVaney, 51 IBLA 165, 168 (1980)), under the present circumstance referral to the Hearings Division is the proper course of action. See Stephen Northway, supra at 308.

8/ Since ALSC represents the heirs of Linda Anelon, service of the notice of hearing on ALSC shall constitute service on the heirs. However, the Judge should also assure that notice of the hearing is served on the Newhalen Native Corporation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is referred to the Hearings Division for further action consistent herewith.

Bruce R. Harris
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

R. W. Mullen
Administrative Judge